



Office of the Attorney General  
State of Texas

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ATTORNEY GENERAL

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OR98-1098

Dear Mr. Hairston:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 115126.

The China Spring Independent School District (the "district"), which you represent, received a request for information relating to the requestor's client and a former school teacher. You state that you released some of the requested information. However, you claim that the remaining information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted documents contain educational records that must be withheld pursuant to sections 552.026 and 552.114 of the Government Code, and pursuant to the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. In Open Records Decision No. 634 (1995), this office concluded: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978).<sup>1</sup> We have marked the information the district must withhold under FERPA.

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<sup>1</sup>But see 20 U.S.C. § 1232g(a)(1)(A), (d) (parent or adult student has affirmative right of access to that student's education records). See also Open Records Decision No. 431 (1985) (Open Records Act's exceptions to required public disclosure do not authorize withholding of "education records" from adult student).

You first argue that some of the requested documents are confidential under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides, "Any document evaluating the performance of a teacher or administrator is confidential." This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). After reviewing the documents at issue, we conclude that the documents may not be withheld under section 21.355 of the Education Code.

You also argue that the documents in Exhibits B and D are excepted from disclosure by section 552.102 because they contain private material in a personnel file. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common-law privacy and excepts from disclosure private facts about an individual. Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. Although information relating to the investigation of sexual harassment or sexual assault involving a public employee may be highly intimate or embarrassing, the public generally has a legitimate interest in knowing the details of such an investigation. Open Records Decision No. 444 (1986). However, identifying information about the victims of the alleged sexual harassment is protected by the doctrine of common-law privacy and must be withheld. *Morales v. Ellen*, 840 S.W.2d 519, 525 (Tex. App.—El Paso 1992, writ denied). We have marked the information that must be withheld.<sup>2</sup>

You express concern that the release of the requested information would violate the former teacher's liberty interests under the Fourteenth Amendment of the United States Constitution. We note, however, that

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<sup>2</sup>In this instance, one of the victims of the alleged sexual harassment is also the requestor. Thus, he is entitled to information relating to himself. Gov't Code § 552.023 (right of access to records that contain information relating to person that are protected from public disclosure by laws intended to protect that person's privacy interests). However, if someone other than the victim of the investigation or his attorney requests the information, the district should reassert its arguments against disclosure at that time.

[t]o establish a liberty interest, an employee must demonstrate that his governmental employer has brought *false charges* against him that might seriously damage his standing and associations in his community, or that impose a stigma or other disability that forecloses freedom to take advantage of other employment opportunities. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

*Wells v. Hico Indep. Sch. Dist.*, 736 F.2d 243, 256 (5th Cir. 1984) (emphasis added; parallel citations omitted). It is not apparent to us, however, that the requested information constitutes a "false charge." Consequently, the release of this information would not implicate the teacher's Fourteenth Amendment interests.<sup>3</sup> Furthermore, even if it did, we are aware of no authority for the proposition that information may be withheld under section 552.101 on this basis.

You also seek to withhold a specific report under section 552.111. Section 552.111 of the act excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). The document at issue is a transcript of an interview between the former employee and a detective. The document does not contain the detective's advice, recommendation, or opinion. Consequently, the report is not protected under section 552.111.

Finally you contend that the documents in Exhibit C are protected from disclosure by section 552.107. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* The documents at issue contain client confidences or attorney advice or opinion. Therefore, the documents in Exhibit C may be withheld pursuant to section 552.107. All other information must be disclosed to the requestor.

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<sup>3</sup>We further note that information regarding public employees may not be withheld under section 552.101 merely because the information is false. See Open Records Decision No. 579 (1990).